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ELECTRONIC FILING

Hon Anne K Quinlan
Acting Secretary
Surface Transportation Board
395 E Street SW
Washington, DC 20024

November 3, 2008

Re Buffalo & Pittsburgh Railroad, Inc
- Exempt Abandonment -
In Erie and Cattaraugus Counties, NY
STB Docket No AB-369 (Sub-No 7X)

Dear Secretary Quinlan

I writing to respond on behalf of the applicant Buffalo & Pittsburgh Railroad, Inc ("BPRR") to the letter filed with the Board by Western New York Railway Historical Society, Inc ("WNYRHS") seeking to extend the November 5, 2008 effective date of the exemption in this proceeding. Because the letter/comments filed by WNYRHS are untimely, are not filed by shipper or other party with an interest in freight service over the line, and do not present any support for its request, the Board should dismiss the letter or deny the requests set forth

WNYRHS's letter/comments were not timely filed The Notice of Exemption served by the Board and published in the Federal Register on October 6, 2008, required that petitions to stay the effective date (not involving environmental issues) were to be filed by October 16, 2008. Petitions to reopen or for public use were required to be filed by October 27, 2008. Further, the Environmental Assessment served by the Board on October 10, 2008, set October 27, 2008, as the comment date. The Notice of Exemption required that all petitions be served on the undersigned as counsel for BPRR.

WNYRHS's letter was filed after all of the deadlines established by the Board for comments or petitions in this proceeding. Further, WNYRHS failed to serve counsel for BPRR as required. Accordingly, the letter requests should be dismissed as untimely.

WNYRHS has not established any grounds to stay the effective date of the abandonment WNYRHS has requested that the Board extend the current effective date of the abandonment to allow continued discussion and negotiation to serve the historic Orchard Park Station and beyond. This essentially seeks a

The Environmental Assessment issued by the Board on October 10, 2008 recommends environmental and historic conditions that would prevent immediate consummation of the abandonment. Further, BPRR has agreed to discuss rail banking and trail use with the New York State Office of Parks, Recreation and Historic Preservation ("NYS Office of Parks")

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stay of the effective date of the abandonment The Board has adopted standard criteria to be applied in evaluating a request for a stay

The factors to be considered in addressing a motion for stay are (1) whether there is a strong likelihood that petitioners will prevail on the merits, (2) whether petitioners would be irreparably harmed in the absence of a stay, (3) whether issuance of a stay would substantially harm other parties, and (4) whether issuance of a stay would be in the public interest Hilton v Braunskill, 481 U S 770, 776 (1987), Washington Metro Area Transit Comm'n v Holiday Tours, Inc., 559 F 2d 841, 843 (D C Cir 1977), Va Petroleum Jobbers Ass'n v Fed Power Comm'n, 259 F 2d 921, 925 (D C Cir 1958) Parties seeking a stay carry the burden of persuasion on all of the elements required for a stay See generally Canal Auth of Fla v Callaway, 489 F 2d 567, 573 (5th Cir 1974)

The Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS, STB Docket No AB-103 (Sub-No 21X) (served February 28, 2008)

In this instance, WNYRHS has failed to make any showing under these standards, or even attempted to address any of the criteria However, if those criteria were examined, it is clear that WNYRHS would not be able to meet its burden of demonstrating that a stay is required

WNYRHS is essentially seeking to have BPRR preserve a portion of the rail line in order that WNYRHS can run passenger excursions sometime in the future Abandonment proceedings, on the other hand, involve a determination of whether the public convenience and necessity require a railroad to continue providing common carrier freight service over the line 49 USC §10903 WNYRHS has no legal right or contractual right to use the line of railroad that BPRR seeks to abandon for the excursion service that it proposes Nor has WNYRHS provided evidence of any potential future freight service that justify requiring BPRR to maintain its common carrier obligations, and the accompanying costs, over all or any portion of the line BPRR seeks to abandon

The “errors” that WNYRHS claims appear in the notice of exemption are inconsequential or incorrect WNYRHS quibbles over whether freight service ended in 1996 or in 1994² However, in either event, service ended more than 10 years before the

² The only example of service cited by WNYRHS was a passenger excursion in June 1996, not freight service

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abandonment exemption was filed (the out of service exemption regulations only require two years) WNYRHS also claims that it received service as a "shipper" within the past two years BPRR acknowledges that it moved a single sleeping car from WNYRHS to Buffalo However, this was clearly not a freight move, and in fact, BPRR did not even charge WNYRHS for moving the car

WNYRHS is not a party with an interest in preserving freight service over the line As noted above, WNYRHS has not provided any evidence that either it or any other potential shipper needs this line to be retained for common carrier freight service No freight or potential freight customers have objected to the abandonment, nor has any party filed an offer of financial assistance to acquire all or part of the line for future rail freight service

WNYRHS has adequate avenues for protection of its interests through the ongoing trail use / railbanking process WNYRHS acknowledges that it is discussing its needs with Erie County Industrial Development Authority (which in turn is in discussions with NYS Office Parks) As BPRR has responded to others, BPRR has already committed to trail use / railbanking discussions with NYS Office of Parks and should not be required to negotiate with other parties Because these discussion are ongoing, there is no need to extend the effective date of the abandonment

For all of the reasons set forth above, the WNYRHS comments should be dismissed, or the relief requested therein should be denied BPRR's abandonment should be permitted to take effect on November 5, 2008, as scheduled



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Please let me know if there are any questions about this response. Thank you for your assistance.

Respectfully,

A handwritten signature in black ink, appearing to read "Eric M. Hocky".

Eric M. Hocky

EMH/e

cc Joseph V Kocsis, Jr (by email)
Marc A. Romanowski, Esq. (by email)
Counsel for ECRT
Erik Kulleseid,
Deputy Commissioner for Open Space Protection
David J. Collins (by email)